UNITED STATES OF AMERICA	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	APPELLANT'S REPLY TO *AMICUS CURIAE* BRIEF
	)	Case No. 07-00000001
v.	)	
	)	Tried at Guantanamo Bay, Cuba On 4 June 2007
	)	Before a Military Commission
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)	Convened by MCCO # 07-02
	)	Presiding Military Judge
	)	Colonel Peter E. Brownback III

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

GOVERNMENT'S REPLY TO *AMICUS CURIAE* BRIEF
ON BEHALF OF APPELLEE

As the Government has explained in its briefing to date on the merits, *see* Government's Supplement Brief in Support of Appeal (July 23, 2007) ("Gov. Supp. Br."); Government's Reply Brief in Support of Appeal (Aug. 17, 2007) ("Gov. Reply"), the text, structure, and history of the Military Commissions Act of 2006 ("MCA") clearly establishes that a military judge may hear evidence and determine jurisdiction over Khadr, and that, in the alternative, Khadr's CSRT determination was itself sufficient to establish such jurisdiction. Much like the Defense's brief on the merits, the *amicus curiae* brief ("Am. Cur. Br.") has very little to do with the MCA—the source of law that governs this proceeding. Instead, the *amicus* brief consists almost entirely of arguments grounded in suppositions about international law that are as irrelevant as they are erroneous. Most of these arguments have already been made by the Defense; they have been

rebutted at length by the Government; and they and need not be revisited here. Yet the *amici* have made certain additional misstatements of law, which are laid bare below.

I. The MCA's Legislative History Confirms that Khadr is Subject to Military Commission Jurisdiction

As we have already explained, the MCA's text, structure, and history conclusively establish Congress's intent to provide for military commission jurisdiction over Khadr. The *amici* do not seriously dispute the Government's interpretation of the Act.[1] Rather, they add only one new assertion—that Congress "specifically reject[ed]" an earlier version of the MCA that would have extended military commission jurisdiction to cover "any individual determined by a Combatant Status Review Tribunal before the date of the enactment of the Military Commissions Act to have been detained as an enemy combatant." Am. Cur. Br. at 9. From that fact, they would conclude that Congress intended the term "unlawful enemy combatant" to be narrower than the universe of "enemy combatants."

The exact opposite is true, however: To the extent there is any difference between the two terms, the Act's legislative history suggests that Congress intended "unlawful enemy combatant" to be *broader* than "enemy combatant" as defined under the original bill. During the floor debate over the MCA, Senator John Warner—who as the Chairman of the Senate Armed Services Committee was the floor leader of the bill in the Senate—explained why the statute does not contain the language quoted in the *amicus* brief:

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[1] Instead, the *amici* claim that the Government's interpretation turns on "[i]solated words [, which] are not alone a reliable guide for discovery of a statute's meaning." Am. Cur. Br. at 10 (internal quotation marks and citation omitted). Such an argument is ironic, given the *amici*'s single-minded focus on the isolated word "unlawful," *id.* at 7-14. Likewise, it does not change the fact that the Government's coherent interpretation is the only one that provides meaning for *all* the terms of the statute—including "unlawful," the statutory parenthetical, and "before . . . the date of" the MCA's enactment—and is the only one that is consistent with the structure and history of the Act. Nor is it enough simply to label the Government's interpretation "absurd." *Id.* at 13-14. Appellation alone is no substitute for legal argument.

> We ***expanded*** th[e] definition of "unlawful enemy combatant" when we went from the committee bill to [the final version of the MCA, which] was worked on by, again, Senator McCain, Senator Graham, and myself, and in conjunction with the White House and our leadership and other colleagues. It was pointed out to us that perhaps our bill is drawn so narrowly that we would not be able to get evidence and support convictions from those who are involved in hiding in the safe houses, wherever they are in the world, including here in the United States.

152 Cong. Rec. S10250 (Sept. 27, 2006) (emphasis added). Thus, while CSRTs are used only at Guantanamo Bay, Senator Warner explained, military commission jurisdiction is *not so limited.* The MCA's jurisdictional provisions certainly include those individuals who have been determined to be enemy combatants, such as Khadr, but they also cover others who have never received CSRTs, such as those detained outside of Guantanamo Bay. As the Government has explained, much of the confusion about the jurisdictional provisions of the MCA is resolved when it is understood that Congress sought to provide a comprehensive system for trying unlawful combatants in this and future conflicts. *See* Gov. Supp. Br. at 13.

Senator Warner's explanation is of crucial importance—he was the bill's floor manager and the authoritative voice on the intent of the bill. *See, e.g.*, 2A Norman J. Singer, *Sutherland Statutory Construction* § 48:14, at 472-74 (6th ed. 2000). His statement makes clear Congress's intent that CSRTs—rendering "enemy combatant" decisions regarding al Qaeda and the Taliban—suffice to establish military commission jurisdiction.

II. The *Amici*'s Reliance on International Law Is Irrelevant and Wrong

As the Court recognized at oral argument, the *amici*'s efforts to rely on the Protocol Additional to the Geneva Conventions of 1977 ("Protocol I") is flawed from the beginning because it was never ratified by the United States and thus does not constitute binding international law here. *See* Preliminary Oral Argument Tran. at 58. The Court accordingly need not engage in any extended exegesis of this document with no binding legal force in United

States law. *Amici* attempt to argue, however, that certain former U.S. officials have "endorsed as customary law" certain parts of Protocol I, including Article 45. *See* Am. Cur. Br. at 3 (quoting Michael Matheson, *The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference* (Fall 1987) in 2 AM. U. J. INT'L L. & POL'Y 419 (1987)). Needless to say, the isolated remarks of former officials do not amount to binding declarations as to what is customary international law.[2]

What is more, however, is that *amici*'s characterization of these former officials' views is demonstrably false. In the paragraph immediately preceding the one quoted in the *amicus* brief, former Deputy Legal Adviser Michael Matheson *affirmatively disclaimed* the "customary" legal effect of Article 45. He stated:

> [W]ith respect to combatant and prisoner-of-war status, we support the principle that persons entitled to combatant status be treated as prisoners of war in accordance with the 1949 Geneva Conventions, as well as the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations. These statements are, ***of course***, related to but ***different from the content of article[] . . . 45*** . . . .

2 AM. U. J. INT'L L. & POL'Y at 425 (emphasis added). Indeed, as he further explained, "***Protocol I cannot now be looked to*** by actual or potential adversaries of the United States or its

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[2] It is a bedrock legal principle that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900). In contrast, Matheson's comments—cited (albeit out of context) by the *amici*, *see* Am. Cur. Br. at 3—were entirely aspirational. *See* 2 AM. U. J. INT'L L. & POL'Y at 425 (noting that "we . . . *support* [a certain] principle") (emphasis added); *id.* at 426 (noting that certain individuals "*should* have [certain] right[s]") (emphasis added); *see also id.* at 471 (remarks of former Legal Adviser Abraham D. Sofaer) (noting that the United States "*intend[s]* to consult with our allies to develop appropriate methods for incorporating [certain] provisions" of Protocol I) (emphasis added). Such "speculations . . . concerning what the law *ought* to be" are utterly immaterial. *The Paquete Habana*, 175 U.S. at 700 (emphasis added). *See also Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 265 (2d Cir. 2003) (holding neither "the policy-driven or theoretical work of advocates" nor the "personal viewpoints expressed in the affidavits of international law scholars" can serve as sources of customary international law).

allies as a definitive indication of the rules that United States forces will observe in the event of armed conflict and will expect its adversaries to observe." *Id.* at 420 (emphasis added).[3]

Not only did Mr. Matheson expressly repudiate the views attributed to him by the *amicus* brief, he also emphasized that only those who "distinguish themselves from the civilian populations" and "carry their arms openly during engagements and deployments" may qualify for prisoner of war ("POW") status. *Id.* at 425. While this point should be self-evident, the *amici* take the remarkable position that members of al Qaeda and the Taliban are presumptively entitled to be treated as POWs, *see* Am. Cur. Br. at 11-17,[4] notwithstanding the fact that no one—not even the *amici*—contends that those unlawful forces operate under responsible command, wear distinctive uniforms and insignia, carry their arms openly, and abide by the laws and customs of war. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4 (Aug. 12, 1949). Indeed, the very reason that the United States refused to ratify Protocol I was that it opposed extending the protections of the Geneva Conventions to terrorists and associated unlawful combatants, who flout its strictures. As President Reagan explained:

> We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

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[3] While *amici* cite to a February 2002 memorandum by former Legal Adviser William Taft IV, *see* Am. Cur. Br. at 16, the *amici* fail to cite another Taft memorandum, sent the following month, which further undermines its claim regarding the applicability of Protocol I. *See* Memorandum for William J. Haynes, General Counsel, Department of Defense, from William H. Taft IV, Legal Adviser, Department of State, *Re: 1949 Geneva Conventions: The President's Decisions Under International Law* (Mar. 22, 2002). In the later Taft memorandum, the State Department explained that certain Department of Defense regulations and manuals may be consistent with Protocol I as a matter of "operational need" and policy, "rather than on the basis that such a result was legally compelled." *Id.* at 83; *compare* Am. Cur. Br. at 4 (arguing that DoD compliance with Protocol I is probative of the United States obligatory "compliance" with that instrument).

[4] *Amici* argue, *see* Am. Cur. Br. at 12-14, that "a Taliban member might be a lawful or unlawful combatant," *id.* at 12. Not only is that assertion plainly wrong—given the statutory parenthetical, the President's orders on February 7, 2002 and July 20, 2007, and for all the reasons explained in the Government's other briefs—but it is also irrelevant. Khadr's CSRT determined that he is a member of al Qaeda; the lawfulness *vel non* of the Taliban is of no moment here.

President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). It is simply untenable to argue that the United States should be bound, as a matter of customary international law, to provide terrorists and associated unlawful combatants the same protections it has steadfastly refused to grant them as a matter of treaty law.

To the extent that Mr. Matheson even aspirationally supported a principle in article 45, it was the routine and uncontroversial claim that, "should any doubt arise as to whether a person is entitled to [POW] status," his status should be determined by a competent tribunal. *See* 2 AM. U. J. INT'L L. & POL'Y at 425. Mr. Matheson's comments never extended to any assertion in article 45 regarding the appropriate timing of such a determination, *vis-à-vis* a trial to determine criminal liability. In any event, the MCA meets even the article 45 standard—which, again, is not law of any kind that is binding on the United States—a proposition the *amici* never address, much less rebuts. *See* Gov. Reply at 5-6 & n.2. The Rules for Military Commissions ("RMCs") provide that personal jurisdiction over the defendant shall be determined "before trial for the offense." RMC 905(c). Accordingly, even if Protocol I is applicable, nothing in the Military Commissions Act or the rules implementing it is inconsistent with it.

//s//
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 31st day of August 2007.

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